Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

THE HONORABLE BYRON KINDER,
Circuit Judge, 19th Judicial Circuit,
Cole County, Missouri,
Petitioner,

v.

STATE OF MISSOURI ex rel.
JEREMIAH W. NIXON,
Attorney General,
Respondent.

On Petition for Writ of Certiorari
to the Missouri Court of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an individual has the right under the due process clause to be competent to stand trial and to assist counsel in a sexually violent predator proceeding where his liberty is at stake.

PARTIES TO THE PROCEEDING

Petitioner, the Honorable Byron Kinder, Circuit Judge of the 19th Judicial Circuit, Cole County, Missouri, was the respondent below. Respondent, Jeremiah W. Nixon, Missouri Attorney General, was the relator below.

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OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, prohibiting Judge Byron Kinder from ordering a competency evaluation of Jesse Moyers, an individual Missouri is seeking to civilly commit to secure confinement as a sexually violent predator, and ordering Judge Kinder to proceed to trial without a competency determination, filed April 8, 2004, and reported at 129 S.W.3d 5 (Mo. App., W.D. 2004), is reprinted in the Appendix at 1-A to 10-A. The cause was transferred to the Missouri Supreme Court for briefing and argument after the initial ruling by the Missouri Court of Appeals, Western District, but was re-transferred without opinion by the Missouri Supreme Court to the Missouri Court of Appeals, Western District which re-adopted its earlier opinion.

JURISDICTION

The Missouri Court of Appeals, Western District, issued its writ of Prohibition on August 5, 2003. Petitioner filed a motion in the Missouri Court of Appeals, Western District, for transfer to the Missouri Supreme Court pursuant to Missouri Rule of Procedure 83.02, which permits such motion within fifteen days of the date of the opinion by a District of the Court of Appeals. On September 5, 2003, the Missouri Court of Appeals, Western District, denied petitioner's motion. Petitioner filed an application for transfer in the Missouri Supreme Court pursuant to Missouri Rule of Procedure 83.04 which permits such application within fifteen days of the denial of the Rule 83.02 motion for transfer by a District of the Court of Appeals. On November 25, 2003, the Missouri Supreme Court granted the application for transfer and the case was briefed and orally argued in that Court. On March 30, 2004, the Missouri Supreme Court transferred the case back to the Missouri Court of Appeals, Western District, without issuing an opinion, pursuant to Missouri Rule of

Procedure 83.09 which provides: "If ... in cases transferred on order of this Court, the Court concludes that the transfer was improvidently granted, the case may be retransferred to the Court of Appeals." On April 8, 2004, the Missouri Court of Appeals, Western District, readopted its August 5, 2003, opinion and immediately issued its mandate making its writ of Prohibition absolute, without providing petitioner a second opportunity to file a Missouri Rule of Procedure 83.02 motion for transfer to the Missouri Supreme Court. Under this procedure petitioner's access to review by the state's highest court was exhausted by his prior motion and application.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a), due to an important question of federal law not yet decided by this Court: whether an individual is entitled under the Due Process Clause of the Fourteenth Amendment to be competent to stand trial and to assist counsel in a sexually violent predator proceeding where his liberty is at stake; and on the possibility of a potential conflict between the state courts of last resort in Missouri, Iowa, and Texas on this question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1:

No state ... shall ... deprive any person of life, liberty or property without due process of law ....

Section 632.492, Revised Statutes of Missouri (RSMo) 2000:

... at all stages of the proceedings pursuant to sections 632.480 to 632.513 [Missouri's Sexually Violent Predator

Act], any person subject to sections 632.480 to 632.513 shall be entitled to the assistance of counsel. –

INTRODUCTION AND STATEMENT

Missouri filed a petition on July 18, 2002, under the state's Sexually Violent Predator (SVP) Act, Sections 632.480 to 632.513, RSMo 2000, to commit Jesse Moyers to the Department of Mental Health for control and treatment in a secure facility until his mental abnormality, if he has one, has so changed that he is safe to be at large. A mental abnormality under the SVP act is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." Section 632.480(2), RSMo Cum. Supp. 2002. The Office of the State Public Defender was appointed to represent Mr. Moyers.

On August 23, 2002, the Honorable Byron Kinder found probable cause to believe that Mr. Moyers is a sexually violent predator, and ordered a psychological evaluation pursuant to Section 632.489, RSMo 2000. That section provides: "If the probable cause determination is made, the court shall direct that the person be transferred to an appropriate secure facility … for an evaluation as to whether the person is a sexually violent predator."

Dr. Stephen Mandracchia of the Missouri Department of Mental Health was assigned to conduct the evaluation. Dr. Mandracchia contacted Mr. Moyers' counsel several times to advise counsel that Mr. Moyers was incompetent and could not assist in the evaluation. In the doctor's report to the court, he noted that "in recent communications from personnel at the Missouri Sexual Offender Treatment Center [Mr. Moyers] has

been described as seriously psychiatrically disturbed." Dr. Mandracchia summarized his findings on October 28, 2002: "[Mr. Moyers] is a 54-year old male with an extensive history of psychiatric and behavioral instability whose recent/current functioning is described as acutely psychiatrically impaired."

Mr. Moyers' counsel filed a motion on October 24, 2002, for a competency evaluation to determine Mr. Moyer's capacity to understand the trial proceedings and to assist counsel in preparation of his defense to Missouri's petition to securely confine him as a sexually violent predator, and to stay the proceedings pending the outcome of that evaluation. Missouri filed an objection to such evaluation the next day. The court granted Mr. Moyers' motion on October 28, 2002, the day it received Dr. Mandracchia's report.

Missouri filed a petition for a writ of prohibition and of mandamus in the Missouri Court of Appeals, Western District, on January 28, 2003, seeking to prohibit Judge Kinder from proceeding with the competency evaluation and to force Judge Kinder to set the case for trial without an evaluation of Mr. Moyers' competency to stand trial or assist counsel. The Missouri Court of Appeals, Western District issued a preliminary writ on February 11, 2003, and scheduled the case for briefing and argument. The Missouri Court of Appeals, Western District made the writ absolute on August 5, 2003. The Missouri Court of Appeals, Western District denied Mr. Moyers' motions for re-hearing or transfer to the Missouri Supreme Court on September 30, 2003.

The Missouri Supreme Court granted Mr. Moyers' application for transfer to that Court on November 25, 2003. The case was briefed and argued before the Missouri Supreme Court on March 4, 2004. On March 30, 2004, the Missouri Supreme Court transferred the case back to the Missouri Court of Appeals, Western District without an opinion. On April 8,

2004, the Missouri Court of Appeals, Western District adopted its earlier opinion making the writ absolute.

The Missouri Court of Appeals, Western District preliminarily noted that the SVP act contemplates civil commitment rather than criminal confinement, similar to ***Kansas v. Hendricks***, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). 129 S.W.3d at 8. *Criminal* defendants cannot be brought to trial if as a result of a mental disease or defect they lack the capacity to understand the proceedings or assist counsel. ***Id***. Chapter 552 of the Missouri Statutes governing "Criminal Proceedings Involving Mental Illness," is limited to criminal prosecutions. ***Id***. Since no similar statutory requirement is provided in the Sexually Violent Predator Act, the Missouri Court of Appeals, Western District concluded that if such a requirement exists in an SVP proceeding it must be derived from a court rule or the due process requirements. ***Id***.

No Missouri Court Rule requires competency to stand trial or assist counsel in a civil commitment proceeding. ***Id***. "The very nature of civil commitments is that they commit for treatment those who pose a danger to themselves or others because they suffer a mental disease or defect *and are unable to comprehend reality or to respond to it rationally*." ***Id***. (emphasis added). Missouri Rules, however, do provide that a guardian ad litem or next friend be appointed for mentally impaired persons in civil cases. ***Id***. Rule 52.02(k) states:

> Whenever it shall be suggested or affirmatively appear to the court that any person not having a duly appointed guardian is incapable by reason of mental or physical infirmity of instituting or of properly caring for the person's own interest in any litigation brought by or against such person, the court shall inquire into the person's mental or physical condition for the purpose of the particular litigation and shall hear and

> determine such issue. If it is found to be proper for the protection of the person, the court may appoint a next friend or guardian ad litem for said person for the purpose of the particular litigation.

Id. From this the Missouri Court of Appeals, Western District held: "Thus, Rule 52.02 contemplates persons involved in litigation who suffer from mental infirmity are not prevented from initiating litigation and are not immune from civil prosecution by reason of such mental infirmity." ***Id.***

The Missouri Court of Appeals, Western District began its analysis of a due process requirement for competency by noting that, "Although the Missouri courts and the United States Supreme Court recognize that '[c]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,' these decisions have never specifically addressed and extended the due process issue to one's competency to stand trial in a sexually violent predator determination. ***Id.***, at 9 (internal citations omitted).

The Missouri Court of Appeals, Western District noted that this Court's opinion in ***Jackson v. Indiana***, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972) served as precedent for conducting civil commitment proceedings against a person who is incompetent to stand trial in a criminal proceeding. 129 S.W.3d at 10. The Missouri legislature incorporated that concept into Chapter 552 of the Missouri Statutes. The Missouri Supreme Court followed it in ***State ex rel. Baumruk v. Belt***, 964 S.W.2d 443 (Mo. banc 1998) and ***Ex parte Kent***, 490 S.W.2d 649 (Mo. banc 1973). ***Id.*** The Missouri Court of Appeals, Western District also noted that, "[Judge Kinder] correctly notes that *Jackson* concerns the *customary civil commitment* proceeding, indicating, in Missouri, the general civil commitment statutes from sections 632.300 to 632.475." ***Id.*** (emphasis in original). The Missouri Court of Appeals,

Western District further noted that, "the basis for civil commitment under the sexually violent predator statutes is not the same as that under the general civil commitment statutes," but held that, "for the purposes of *Jackson*, *Baumruk*, and *Kent*, the rationale derived from these decisions applies to the sexually violent predator civil commitment statutes as well." ***Id.***

The Missouri Court of Appeals, Western District ultimately held that subjecting a suspected sexually violent predator to a statutory sexually violent predator determination, regardless of whether he is competent, is not an unconstitutional deprivation of liberty:

> To rule that [Missouri] must pursue civil commitment under the general civil commitment statutes rather than the sexually violent predator statutes would defeat the purpose of the sexually violent predator determination that a person determined to be a sexually violent predator needs specialized sexually violent predator treatment. To adopt the rational that Mr. Moyers does not possess the competency to proceed to trial to determine whether he is a violent sexual predator, and if so determined, to subject him to the specific treatment contemplated for the condition by the statute would thwart the proper exercise of legislative authority for the health and welfare of the state's citizens, but it would also jeopardize Mr. Moyers' receipt of proper rehabilitating treatment.

Id.

REASONS FOR GRANTING THE WRIT

I. Due process of law requires that a person alleged to be a sexually violent predator be competent to understand the proceedings and to assist counsel before he is deprived of his liberty.

Missouri's legislature provided a right to counsel to persons defending against the State's involuntary commitment petition, including the appointment of counsel for indigents. Section 632.492, RSM0 2000. Due process of law requires that counsel be able to effectively represent his or her client. The Missouri Supreme Court requires that before probation can be revoked the probationer must be competent to assist counsel because, "the general assembly afforded these rights to probationers; therefore, it can hardly be imagined that the general assembly did not intend probationers to proceed to hearing without having the capacity to exercise them." ***State ex rel. Juergens v. Cundiff***, 939 S.W.2d 381, 382 (Mo. banc 1997).

This Court ruled in ***In re Gault***, 387 U.S. 1, 26, 87 S.Ct. 1428, 1442, 18 L.Ed.2d 527 (1967), that it is not the characterization of the proceeding which determines whether the constitutional guarantees normally utilized only in criminal matters apply, but rather what is at stake for the individual. ***Gault*** was a juvenile proceeding, a matter long considered civil. Because Gault's liberty was at stake, this Court extended due process rights normally only applicable in criminal cases to his juvenile proceeding. Liberty is also at stake for Mr. Moyers, so it matters not that this proceeding is labeled "civil."

Texas recognizes that that the subject of an involuntary civil commitment is entitled to effective assistance of counsel. ***Ex Parte Ullman***, 616 S.W.2d 278, 283 (Tx. App., 1981). It has also indicated that such entitlement extends to cases where

the state seeks the involuntary commitment of sexually violent predators. ***Beasley v. Mollet***, 95 S.W.3d 590, 602-603 (Tx. App., 2002).

In Missouri, a juvenile must be competent to assist in a juvenile extradition, ***State ex rel. Reed v. Frawley***, 59 S.W.3d 496, 497 (Mo. banc 2001), and must be competent to be certified to stand trial as an adult. ***State ex rel. D.C. v. The Honorable Maura McSchane***, No. SC 85555 (Mo. banc 2004). Such competency was required to give effect to the right to counsel. ***Frawley***, 59 S.W.3d at 497. "A right to counsel is an 'empty formality' if it is not also assumed that the assistance of counsel must be effective. Such a right becomes meaningless 'as the sound of tinkling brass' if an accused lacks the mental capacity to knowingly and intelligently confer with counsel respecting the charges or issues brought against him and to assist counsel by means of supplying information pertinent to those issues." ***Id.***

The State of Missouri prefers to commit Mr. Moyers as a sexually violent predator, even though he is not competent to proceed, rather than commit him under the general civil commitment statutes. These statutes place greater burdens on the States and provide safeguards to committees like Mr. Moyers. If Missouri commits Mr. Moyers under the general civil commitment statutes the burden falls upon Missouri to initiate new commitment proceedings every year to continue the commitment. Section 632.360, RSMo 2000. (At the end of any detention period ordered by the court under this chapter, the respondent shall be discharged unless a petition for further detention is filed and heard in the same manner as provided herein). But if Missouri secures Mr. Moyers' commitment as a sexually violent predator, it shifts the burden to him to seek his own release by initiating the process. Section 632.498, .501, RSMo 2000.

Mr. Moyers' inability understand the proceedings and assist counsel interferes with appointed counsel's ability to secure assistance from Mr. Moyers or to effectively and adequately prepare a defense to the allegations Missouri has made against him. This cannot be the process to which Mr. Moyers is due. Missouri is putting form over substance. As long as it *appears* that the trial and involuntary commitment was conducted with necessary formality, it is of no significance to Missouri whether the trial is a fair search for the truth or that the commitment is justified according to the applicable law and underlying facts.

Sexually violent predator commitment is an improper mechanism for general deterrence. ***Kansas v. Hendricks***, ***supra.***; ***Kansas v. Crane***, 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002). Missouri is ignoring this warning by using its Sexually Violent Predator act to confine Mr. Moyers in a secure facility while rejecting his ability to assist counsel and counsel's ability to adequately prepare a defense to Missouri's assertion that he is, in fact, a sexually violent predator. Missouri seeks to deter by confining possible sexually violent predators, rather than legitimately and validly determining whether the person is a sexually violent predator in the first place. Missouri's purpose is deterrence; not fairness, not justice, and not due process.

II. Sexually violent predators are committed to involuntary civil confinement for a very specific purpose distinct from that for which all other persons are involuntarily civilly committed.

If this were not so, why would those states involuntarily civilly committing sexually violent predators pass statutes for this purpose separate and apart from their general civil commitment statutes? This Court recognized in ***Kansas v. Hendricks***, 521 U.S. 346, 368, 117 S.Ct. 2072, 2085 138 L.Ed.2d 501 (1997), that the Kansas Act "limited

confinement to a small segment of particularly dangerous offenders." Justice Breyer noted that, "Hendricks' abnormality ... includes a specific, serious, and highly unusual inability to control his actions." 117 S.Ct. at 2088-2089. In ***In the Matter of the Care and Treatment of Norton***, 123 S.W.3d 170 (Mo. banc 2003), the Missouri Supreme Court rejected an equal protection challenge to the denial of commitment in the least restrictive environment appropriate for security to sexually violent predators as compared to persons committed under the general civil commitment statutes. Disparate treatment is constitutional if narrowly tailored to serve a compelling state interest. ***Id***. at 174. The State has a compelling interest in protecting society from crime. ***Id***. "This interest justifies the differential treatment of those persons adjudicated as sexually violent predators when, as determined by the legislature, *such mental abnormality makes them distinctly dangerous because of the substantial probability that they will commit future crimes of sexual violence* if not confined in a secure facility." ***Id***. (emphasis added). The Missouri Court of Appeals, Western District also recognized in this case that, "the basis for civil commitment under the sexually violent predator statutes is not the same as that under the general civil commitment statutes." 129 S.W.3d at 9. "A person determined to be a sexually violent predator *needs specialized sexually violent predator treatment*." ***Id***. at 10 (emphasis added).

The requirement of a mental abnormality specifically resulting in acts of sexual violence rather than dangerousness in general, and the need for specialized treatment, demonstrate fundamental flaws in the Missouri Court of Appeals, Western District's decision here. In spite of its recognition of the distinct bases for SVP commitment and general civil commitment, the Missouri Court of Appeals, Western District denied Mr. Moyers the right to be competent in this proceeding because, "The very nature of civil commitments is that they commit for treatment those who pose a danger to

themselves or others because they suffer a mental disease or defect *and are unable to comprehend reality or to respond to it rationally."* ***Id.*** at 8. Sexually violent predators are not civilly committed because they are unable to comprehend reality or to respond to it rationally. They are committed for a mental abnormality predisposing the person to predatory acts of sexual violence. The Missouri Court of Appeals, Western District decided the case on the presumed need for treatment of persons found to be sexually violent predators, rather than on the accuracy and reliability of afinding in the first instance that the person is a sexually violent predator. If Mr. Moyers cannot assist counsel, and his counsel cannot therefore prepare an adequate defense, how can this or any Court have confidence in a verdict finding him to be a sexually violent predator? If Mr. Moyers is *not* a sexually violent predator he cannot be compelled to receive specialized sexual offender treatment. The Missouri Court of Appeals, Western District reached its conclusion by assuming that Mr. Moyers has already been determined to be a sexually violent predator. Judge Kinder's action in this case is directed at the validity and reliability of the trial at which the jurors will ultimately decide whether Mr. Moyers is a sexually violent predator.

Sexually violent predators are committed so that they may receive specialized sexual offender treatment. They are not committed so that their competency can be restored or so that they can come to comprehend reality and respond to it rationally. A person unable to comprehend reality or respond to it rationally cannot take advantage of the "proper rehabilitating treatment" for sexual offenders that the Missouri Court of Appeals, Western District claimed it was assuring for Mr. Moyers by its decision. 129 S.W.3d at 8. Dr. Mandracchia found that Mr. Moyers' mental disease or defect may have been why he could not complete the Missouri Sexual Offender Program (MOSOP) that is required of all sex offenders in the Department of Corrections. If Mr. Moyers is incapable of comprehending reality or responding to it

rationally, he cannot be expected to take advantage of specialized sex offender treatment that is a necessary predicate to regain his liberty.

Sex offenders are not typically unable to comprehend reality or respond rationally to it. Many, if not most, persons involuntarily committed as sexually violent predators are entirely capable of functioning normally within society, with the exception of the commission of specified sexual offenses which result from a mental abnormality causing them to offend in the specified manner. Sexually violent predator commitment is premised on a mental abnormality causing a very specific and limited predisposition and danger. It is fundamentally different than the purpose, process, and factual basis supporting the general involuntary commitment practiced by Missouri and other states long before the enactment of sexual predator commitment laws. A judicial conclusion that one involuntary civil commitment is like any other is fundamentally and legally flawed.

III. A potential conflict exists between the States on this issue. Missouri and Iowa hold that the respondent to a sexually violent predator petition has no right to be competent to understand the proceedings and to assist counsel, a Texas Appellate Court has held that the person is entitled to that right.

The only other states to have addressed this issue are Iowa and Texas. Iowa held that the respondent to a sexually violent predator petition has no right to be competent to understand the proceedings or to assist counsel. ***Detention of Cubbage***, 671 N.W.2d 442 (Iowa 2003). Iowa's law, like Missouri's, does not require the person's competency to stand trial. ***Id.*** at 444-445. The Iowa Court also rejected that competency is required to satisfy constitutional due process requirements. ***Id.*** at 445-448. The Court found no fundamental right contained in the United States Constitution

to competency in a civil commitment proceeding. ***Id***. at 446-447. The Iowa Court did, however, note the constitutional due process rights of *criminal* defendants to competency. ***Id***. at 447. The Iowa Court relied on the opinion of the Missouri Court of Appeals, Western District below. ***Id***. at 447.

The fallacy of Iowa's position is that there is no constitutional article, section, or amendment specifically establishing a fundamental right to competency to understand the proceedings or to assist counsel in a criminal case. That fundamental requirement *necessarily* follows from the due process clause contained in the Fourteenth Amendment's provision that no person shall be deprived of liberty without due process of law, and the Sixth Amendment's right to counsel. Due process requires that the person be able to understand the proceedings and to assist his attorney before he is deprived of his liberty. This is part of the "process" to which he is "due" because of the implications of the government's actions. Liberty is equally at stake in a sexually violent predator proceeding. ***Kansas v. Hendricks, supra***. And that liberty is at stake for reasons distinct from those in a general involuntary commitment proceeding.

Finally, a sexually violent predator's liberty is recovered differently than that for other persons involuntarily civilly committed. In Missouri, persons committed under the general law are automatically released unless the State files a new petition to continue the commitment. A commitment as a sexually violent predator continues until the person files a petition for his own release. Thus, the fundamental right to liberty, and the distinct basis and manner in which that liberty is lost and recovered, makes Mr. Moyers' ability to comprehend the proceedings and to assist his counsel part of the "process" to which he is likewise "due."

The Texas Court of Appeals held in ***Commitment of Fisher***, 123 S.W.3d 828 (Tex.App., 2003), that the respondent

to the petition has the due process right to be competent to understand the proceedings and to assist counsel as an extension of the statutorily granted right to counsel. State statutes can create interests that are entitled to procedural due process protection under the Fourteenth Amendment, ***Vitek v. Jones***, 454 U.S. 480, 488, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). While one may not have a "constitutional or inherent right" to a particular liberty interest, once a state has afforded the opportunity for that interest, due process protections must be invoked to ensure that the state-created right is not arbitrarily denied or abrogated. ***Greenholtz v. Nebraska Penal Inmates***, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); ***Morrissey v. Brewer***, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); ***Wolff v. McDonnell***, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The Texas Appeals court held that due process requires a meaningful hearing, and Fisher's lack of mental competency to assist his counsel deprived him of a meaningful opportunity to be heard. 123 S.W.3d at 838. In Texas, "Because the SVP statute provides for assistance of counsel, due process requires a person to be able to enjoy that protected right." ***Id.***

Fisher resolved two questions: first, what liberty and due process interests were involved; and second, whether the statute is punitive. ***Id.*** at 835. The right to competency to assist counsel as an element of due process was resolved in the first of these questions. ***Id.*** at 835-838. The punitive nature of the statute was discussed separately. The Texas Appeals court did not limit the right to competency as a matter of criminal law: "Even if the SVP statute were found to be civil, or quasi-criminal, Fisher is minimally entitled to enjoy the statutorily specified opportunity to competently exercise his right to counsel." ***Id.*** at 850.

The State of Texas filed a petition on March 30, 2004, for discretionary review by the Texas Supreme Court. This petition was given Case Number 04-0112. The Texas

Supreme Court has not yet ruled on the State's petition for review. If the Texas Supreme Court does not accept the case on review, the opinion of the Texas Court of Appeals will be the final opinion of a state court of last resort. See ***Roberts v. Cockrell***, 319 F.3d 690 (5th Cir. 2003) fn 14; Texas Rules of Appellate Procedure 68.2. Under that circumstance, there will be a conflict between the states of Missouri and Iowa, and the state of Texas, regarding the right of a respondent to a sexually violent predator civil commitment proceeding under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to be competent to understand the proceedings and to assist counsel.

CONCLUSION

Because of the importance of this issue, and the potential for conflict among the states, this Court should grant the petition for certiorari.

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APPENDIX

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MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI EX REL., JEREMIAH W. NIXON,	)	**WD62363**
Relator,	)	
OPINION FILED:		
v.	)	
	)	**August 5, 2003**
THE HONORABLE BYRON KINDER,	)	
Respondent.	)	

ORIGINAL PROCEEDING IN PROHIBITION AND MANDAMUS

Before: Robert G. Utrich, P.J., Paul M. Spinden and Ronald R. Hofliger, JJ.

Proceedings to determine whether Jessie Moyers is a sexually violent predator and should be civilly committed are pending in Cole County. § 632.492, RSMo. **Cum.** Supp. 2001 Respondent, the Honorable Byron Kinder, Circuit Judge, 19th Judicial Circuit, is conducting the proceedings, styled In re Jessie Moyers, Case Number 02PR323 155, 19th Judicial Circuit. The Attorney General, in behalf of the State (Relator), seeks this court's writ of prohibition to prohibit Respondent from proceeding further with a competency examination to determine whether Jessie F. Moyers understands the nature of the proceedings to commit him civilly as a sexually violent predator as provided by sections 632.480 through 632.513, RSMo Cum. Supp. 2001, and whether he can assist counsel in

his defense. Relator also seeks this court's writ of mandamus to compel Respondent to proceed with the trial of Mr. Moyers as provided by section 632.492, RSMo Cum. Supp. 2001, to determine whether Mr. Moyers is a sexually violent predator and, if he is so determined, to effect his civil commitment. This court's Preliminary Rule in Prohibition was issued February 11, 2003, directing Respondent to refrain from proceeding further in the case until further order of this court.

The State's petition for prohibition and mandamus is granted, and the Preliminary Rule in Prohibition is amended as provided by this opinion and is, hereby, made absolute.

Facts

Jessie F. Moyers was convicted most recently of Child Molestation, First Degree, and sentenced to five years incarceration. § 566.067, RSMo 2000. He has several convictions for sexual misconduct. Prior to Mr. Moyers' release from custody for completion of the sentence imposed in his most recent conviction, the Attorney General in behalf of the State, filed a petition seeking Mr. Moyers' ultimate civil commitment as a sexually violent predator. **§ 632.480 — 632.513, RSMo Cum. Supp. 2001.** Respondent conducted a probable cause hearing as provided by section 632.489, RSMo 2000, and found that probable cause exists to believe that Mr. Moyers is a sexually violent person within the meaning of section 632.480(5), RSMo Cum. Supp. 2001. Respondent ordered that Mr. Moyers be taken into custody for evaluation as to whether he is a sexually violent predator by the Department of Mental Health and examined by a psychiatrist or psychologist as provided by section 632.489.4, RSMo 2000, to determine whether he is a sexually violent predator as defined by section 632.480(5). The evaluation was completed as directed, and a report of examination was filed with the court as provided by law. § 632.489.4, RSMo 2000. Thereafter, Mr. Moyers, through counsel, sought and obtained Respondent's order directing that Dr. Steven Mandracchia, Department of Mental Health, Western Missouri Mental

Health, evaluate Mr. Moyers to determine whether he understands the nature of the proceedings against him and whether he is able to assist counsel in his defense of the matter. The order also stayed the proceedings.

Section 632.492, RSMo Cum. Supp. 2001, requires that "[w]ithin sixty days after the completion of any examination held pursuant to section 632.489, the court shall conduct a trial to determine whether the person is a sexually violent predator." Respondent has not conducted the trial required by section 632.492, and Relator also seeks this court's writ mandating Respondent to conduct the trial required by the statute.

Jurisdiction and Standard of Review

This court's jurisdiction in this original writ proceeding is derived from Missouri Constitution, Article V, section 4. Prohibition will lie only to prevent an abuse-ofjudicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-judicial power. ***State cx ret Linthicum v. Calvin,*** 57 S.W.3d 855, 857 (Mo. bane 2001). In a proceeding for a writ of prohibition, the actions of the trial judge are presumed proper. ***State cx ret Jackson County Prosecuting Attorney v. Moorhouse,*** 70 S.W.3d 552, 554 (Mo. App. W.D. 2002). The Relator has the burden to establish that the trial judge abused his discretion and that prohibition is proper. ***Id.***

Mandamus will lie only upon an unequivocal showing that a public official failed to perform a ministerial duty imposed by law. ***Bergman v. Mills,*** **988 S.W.2d 84, 88 (Mo. App.** W.D. 1999). To be entitled to relief, the applicant must show a clear, unequivocal, specific, and positive right to have performed the act demanded. ***Id.***

Discussion

Relator asserts that Respondent erred in ordering a competency examination and in delaying the trial required by section 632.492 because such evaluation is not a prerequisite to the trial, neither statute nor constitution requiring it, and

such evaluation is not contemplated by the statutory scheme for determining whether a person is a sexually violent person requiring confinement and treatment.

Section 632.492 contemplates civil commitment for treatment and not criminal confinement as punishment. The characteristics of the Missouri proceedings are similar to those of the Kansas law addressed in ***Kansas v. Hendricks,*** 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), in which the United States Supreme Court determined that the statutory scheme was civil in nature and not criminal. The Missouri Act, like the Kansas Act, is not included within the criminal code. The Attorney General's petition is filed in Probate Court. § 632.484.1, RSMo 2000. The applicable statutes make provision for treatment. § 632.495, RSMo Cum. Snpp. 2001. The provision for treatment expresses the legislative intent "that treatment, if possible, is at least an ancillary goal of the Act, which usually satisfies any test for determining that the Act is not punitive." ***Hendricks,*** 521 U.S. at 368 n.5.

Section 552.020.1, RSMo 2000, provides that "[nb person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." Chapter 552 is captioned "Criminal Proceedings Involving Mental Illness" and is applicable to criminal proceedings. The statutory scheme expressed by sections 632.480 through 632.5 13 does not state a similar requirement for the civil commitment contemplated by its provisions. Thus, if the provisions of section 552020.1 requiring that the subject person understand the nature of the proceedings and be able to assist counsel in a defense are required in the civil commitment proceeding expressed by section 632.492, the obligation is invoked either by Supreme Court Rule or due process requirements.

No Supreme Court Rule mandates that a person for whom civil commitment is sought tinder any statute must be able to understand the nature of the proceedings or be able to assist

counsel. The very nature of civil commitments is that they commit for treatment those who pose a danger to themselves or others because they suffer from a mental disease or defect and are unable to comprehend reality or to respond to it rationally. Rule 52.02(k) provides for the appointment of a next friend or guardian ad litem for mentally or physically impaired persons. The rule states:

> Whenever it shall be suggested or affirmatively appear to the court that any person not having a duly appointed guardian is incapable by reason of mental or physical infirmity of instituting suit or of properly caring for the person's own interests in any litigation brought by or against such person, the court shall inquire into the person's mental or physical condition for the purpose of the particular litigation and shall hear and determine such issue. If it is found to be proper for the protection of the person, the court may appoint a next friend or guardian ad litem for said person for the purpose of the particular litigation.

Rule 52.02(m) provides that if a next friend or guardian ad litem is not appointed where appropriate, the proceedings are not invalid if the court finds that the interests of the mentally or physically infirm person were adequately protected. Thus, Rule 52.02 contemplates persons involved in litigation who suffer from mental infirmity are not prevented from initiating litigation and are not immune to civil prosecution by reason of such mental infirmity. The provisions in the Rule allow for the appointment of a legal representative, either a guardian ad litem or a next friend, as the proceeding requires.
Respondent's remaining argument that due process requires the subject person to understand the nature of the proceedings against him and to be able to assist his counsel in a civil commitment trial under section 632.492 is also without merit. Relevant case authority, the conferral of a number of rights

normally enjoyed in the criminal setting allowed for in the special statutory proceedings of the sexually violent predator act, and the option of invoking Rule 52.02 demonstrate sufficient due process protection in a sexually violent predator determination trial.[1]

According to the United States Supreme Court and the Missouri Supreme Court, the "Due Process Clause of the United States Constitution mandates that a criminal defendant have the right not to be tried while legally incompetent." ***State cx reL Baninruic v. Belt,*** 964 S.W.2d 443, 444 (Mo. **bane 1998) (quoting *Drope v. Missouri,* 420 U.S. 162, 171-73, 95 S.Ct.** 896,
903-05, 43 L.Ed.2d 103 (1975)). Regardless of this long-standing protection for incompetent criminal defendants, no such precedent exists allowing for a similar protection to an incompetent person in an involuntary civil commitment trial under section 632.492 to determine whether such person is a sexually violent predator.

Although the Missouri courts and the United States Supreme Court recognize that "[c]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," ***In re Care of Coffman,*** 92 S.W.3d 245, 252 (Mo. App. E.D. 2002)(quoting ***Addington v. Texas,*** 441 U.S. 418, 425, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323, 330-3 1 (1979)), these decisions have never specifically addressed and extended the due process issue to one's competency to stand trial in a sexually violent predator determination. In ***Coffinan,*** the Eastern District found plain error in the court's failure to instruct the jury on whether emotional or volitional impairment caused 'serious difficulty' in controlling sexually violent behavior. ***Id.*** at 252-53. The court, in ordering a new trial, reasoned that under a recent Missouri Supreme Court decision, the subject person's right to

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[1] Rule 52 conveys the distinct implication that one suffering from a mental infirmity will not be denied liberty interests if a guardian or next friend is not appointed by the court when the court believes that the interests of the mentally infirm are adequately protected. Rule 52.02(m).

due process would be violated if the jury were not required by jury instruction to make a lack of control determination. ***See Thomas v. State,* 74 S.W.3d 789, 791-92 (Mo. bane 2002).** The ***Coffmai,*** and ***Thomas*** decisions correctly implicate a person's fundamental right in malcing sure the jury's final determination was based on explicit instructions as to the very nature of the civil commitment, whether the person has 'serious difficulty' in controlling his sexually violent behavior. However, these decisions in no way extend these due process rights to the issue of the person's trial competency in a determination of whether he should be committed for treatment as an sexually violent predator. The goal of the legislature in determining the need for, and providing, treatment "satisfies any test for determining that the Act is not punitive." ***Hendricks,*** 521 U.S. at 368 u.S. This is especially evident considering that the sexually violent predator statute specifically requires a mental examination to determine sexually violent predator propensity once probable cause is established, yet nowhere in the sexually violent predator statute is a person's competency contemplated as a prerequisite for a subject person to stand trial for civil commitment as a sexually violent predator. § 632.489.4, RSMo 2000. Civil commitment for sexually violent predator treatment shares no parallel with the determination of lack of competency under section 552.020 in criminal trials.

Precedent exists for conducting civil commitment proceedings for a person who is incompetent to stand trial in a criminal proceeding. In ***Jackson v. Indiana,*** 406 U.S. 715, 738, 92 S.Ct. 1845, 1858,32 **L.Ed.2d** 435 (1972), the U.S. Supreme Court considered a state's legal inability to retain in custody a person who is incompetent to stand trial for a criminal charge and who is likely to remain incompetent indefinitely -and left civil commitment as an option, despite the person's incompetence. The Court found that if after a determination is made that there is a substantial probability that he will [not] attain capacity in the foreseeable future.. .the
State must either institute the customary civil commitment

proceeding that would be required to commit indefinitely any other citizen, or release the defendant." ***Id.*** The Court expressly allowed a state to immediately pursue the civil commitment of one who is, as Mr. Moyers claims to be, not competent to stand trial. The Missouri Supreme Court followed *Jackson,* thus endorsing that same rule. *Bau,nruk,* 964 S.W.24 at ***444; Ex parte Kent,*** 490 S.W.2d 649, 651 (Mo. bane 1973). This option to immediately pursue civil commitment once it is evident that the person will not attain competency in the foreseeable future has been adopted in Missouri in section 552.020.11(6).

Respondent correctly notes that ***Jackson*** concerns the *customary civil commitment* proceeding, indicating, in Missouri, the general civil commitment statutes from sections 632.300 to 632.475. Although the basis for civil commitment under the sexually violent predator statutes is not the same as that under the general civil commitment statutes, for the purposes of ***Jackson, Baumruk,*** and ***Kent,*** the rationale derived from these decisions applies to the sexually violent predator civil commitment statutes as well. These decisions found constitutional the incompetent accused criminalts minor deprivation of liberty when an immediate civil commitment proceeding followed. Subjecting a suspected sexually violent predator to a statutory sexually violent predator determination, regardless of competency, is not an unconstitutional deprivation of liberty. To rule that the Relator must pursue civil commitment under the general civil commitment statutes rather than the sexually violent predator statutes would defeat the purpose of the sexually violent predator determination that a person determined to be a sexually violent predator needs specialized sexually violent predator treatment. To adopt the rationale that Mr. Moyer does not possess the competency to proceed to trial to determine whether he is a violent sexual predator, and if so determined, to subject him to the specific treatment contemplated for the condition by the statute would thwart the proper exercise of legislative authority for the health and welfare of the state's citizens but it would also

jeopardize Mr. Moyer's receipt of proper rehabilitating treatment.

Analysis of the statutes relating to sexually violent predator proceedings also supports the finding that a suspected predator is not entitled to a competency examination. The General Assembly conferred numerous rights on suspected sexually violent predators in the special statutory proceeding because even in civil proceedings for involuntary commitment, the person whose commitment is sought has a liberty [interest] protected by the Due Process Clause from arbitrary governmental action." ***In re Salcedo,*** 34 S.W.3d 862, 867 (Mo. App. S.D. 2001)(quoting ***Hendricks,*** 521 U.S. 346). Rights enjoyed by a suspected predator satisfying due process include the right to a preliminary determination by the probate judge of whether probable cause exists to believe the suspected predator is a sexually violent predator § 632.489.1; the right to contest an adverse probable cause determination at a hearing (§ 632.489.2); the right to appear in person and be represented by counsel at the hearing (~§632489.2 and .3(1)); the right to present evidence and cross-examine adverse witnesses (§ 632.489.3(2) and .3(3)); the right to a jury trial (§ 632.492); the right to require the Attorney General to prove beyond a reasonable doubt that the suspected predator is a sexually violent predator (§ 632.495); and the right to have such a determination made by unanimous verdict (§ 632.495). ***Id.*** Significantly, the right to be competent for trial at a sexually violent predator proceeding is not included in the sexually violent predator statutes.

Relator's petition for a writ of prohibition and mandamus is granted. The preliminary rule in prohibition is amended as follows and is made absolute as amended: Respondent is prohibited from proceeding further with a competency examination to determine whether Jessie F. Moyers understands the nature of the proceedings to commit him civilly as a sexually violent
predator as provided by sections 632.480 through 632.513, RSMo Cum. Supp. 2001, and whether he can assist counsel in

his defense. Further, Respondent is hereby mandated to proceed with the trial of Jessie F. Moyers as provided by section 632.492, RSMo Cum. Supp. 2001, to determine whether Mr. Moyers is a sexually violent predator within the meaning of the applicable statutes, and, if he is so determined, to effect his civil commitment as provided by appropriate law.

Robert G. Ulrich, Presiding

Judge

Writ Division

Spinden, S. and Holliger, S.

concur.